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No. 99-1453

IN THE

Supreme Court of the United States

U.S. *ex rel.* A-1 AMBULANCE SERVICE, INC. *et al.*,

Petitioners,

v.

THE COUNTY OF MONTEREY, CALIFORNIA, and the COUNTY OF SAN MATEO *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Petitioners respectfully submit this Reply to the claims that (1) the Questions to be Decided are improperly before the Court, and (2) petitioners' statement of the case was seriously defective.

1. Petitioners Raised the First Question and this Court's Analysis in *Hughes Aircraft* in Both of the Courts Below.

Respondents erroneously state that petitioners' first question was "abandoned" in the Court of Appeal and that petitioners "did not repeat in the Ninth Circuit Court of Appeals the argument it (*sic*) had made on this subject to the District Court under *Hughes Aircraft*." Opposition Brief at p. 4.

In Appellants' Opening Brief to the Ninth Circuit ("AOB") at pages 28-30, petitioners specifically argued that Congress did not intend to restrict law suits that were not based upon information in the government's possession, relying in part on this Court's decision in *Hughes Aircraft v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997):

> As this Court has noted, "the 1986 amendments were adopted in part to correct a restrictive interpretation of the Act which barred *qui tam* suits whenever the government already possessed the information upon which the lawsuit was based", and by removing the government knowledge bar, Congress clearly sought "to diminish the government's ability to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government . . ." *United States ex rel. Schumer v. Hughes Aircraft*, 63 F.2d 1512, 1518-19 (9th Cir. 1995), *overruled on other grounds*, *Hughes Aircraft*, [*supra*].

> In this light, it is clear that, when Congress changed the jurisdictional standard from "government knowledge" to "public disclosure," it acted to expand, not restrict, the grounds upon which a *qui tam* relator would have jurisdiction to file a lawsuit. *Hughes Aircraft Co.*, 117 S. Ct. at 1876. Thus, Congress did not intend to restrict *qui tam* lawsuits that were *not* based upon information in the government's possession as that class of lawsuits was already permitted prior to 1986, even those which were based upon information already disclosed to the public. [fn omitted]. The public disclosure bar is properly understood as an exception to the new rule established in 1986 — *i.e.* that *qui tam* lawsuits based upon information in the government's possession can go forward — and the enumerated disclosures, in turn, are properly understood as references to disclosures by the federal government. *Cf. Hughes Aircraft Co.*, 117 S. Ct. at 1876 ("Congress amended the FCA in 1986 . . . , to permit qui tam suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed. . . .")

[footnote omitted, underline in original].

Moreover, petitioners argued to the court below that the court had already construed the term "parasitic suit" to mean one where the government already possessed the information underlying the *qui tam* action at AOB p. 31:

> As they did below, appellees will likely defend their reading of the public disclosure bar by arguing that, with the 1986 amendments, Congress intended to deter parasitic law suits, and this is one such suit. While this was Congress's

> intent, this case is not parasitical. This Court has defined a "parasitical suit" as one "where the government already possessed the information underlying the *qui tam* action". *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991).

Finally, in the court below, petitioners mirrored the United States' position to this Court in *Hughes* regarding Congress' rationale for the public disclosure bar. Compare AOB page 32, quoted below to the Petition at p. 21.

> On the other hand, filing a lawsuit based upon a federal government disclosure is clearly parasitic. *If one of the enumerated disclosures is involved, then the federal government employees charged with the responsibility to investigate and prosecute fraud have already initiated an investigation or have had an opportunity to do so.* There is relatively little benefit from permitting *qui tam* actions based upon such information, unless the relator is the "original source" of the information. Indeed, the paradigmatic lawsuit which Congress considered parasitic was *United States ex rel. Marcus v. Hess*, a case where a relator copied the information that was already disclosed in a criminal proceeding.

[Emphasis provided]. AOB at page 32:

2. The Second Question Is a Challenge to Respondents' Standing to Litigate the Public Disclosure Provisions of 31 U.S.C. § 3730.

Respondents argue that petitioners did not raise the second question below, Opp. Brief at p. 15, and that the only party who could conceivably assert the public disclosure bar is a defendant. Opp. Brief at p. 16.

The second question arose as a result of Representative Berman's letter to Attorney General Reno which observed that the lower courts had not had the benefit of the Government's position on public disclosure. Petition at p. 19. This letter came to petitioners' attention after oral argument in the Court of Appeals. Petitioners provided the Court of Appeal with a copy of Mr. Berman's letter prior to its decision in this case.

3. The Respondents Misinterpret 31 U.S.C. § 3730(e)(4)(A) and Their Standing to Litigate the Public Disclosure Issue.

Respondents quote the beginning of 31 U.S.C. 3730(e)(4)(A), "No court *shall have jurisdiction*. . . .". Opp. Brief at p. 17. However, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and scheme. *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989). Respondents omitted the section which identifies the parties affected: ". . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

In the context of the entire section, Congress identified only the Attorney General and relators as parties with a stake in the issue. There is nothing in the statute which indicates that if the Attorney General does not take action on this issue, then defendants can step into her shoes.

Moreover, respondents' argument conflicts with the overall scheme of the False Claims Act. Obviously, overall, the False Claims Act is intended to replenish the federal treasury with money from defendants which have defrauded the United States. As argued to this Court by petitioners and by the United States itself before this Court in *Hughes*, the public disclosure provision is for the limited purpose of protecting the treasury in the amount of the relator's share

where a would-be relator parasitizes the work-product of the United States. This is a bright line objective, in contrast to the view taken by some courts below without the benefit of the Government's view of the legislative history.[1]

The dismissal of *qui tam* suits on so-called public disclosure grounds when raised by defendants leads to the absurd result that the treasury has been deprived not only of the relator's share, but by the entire potential recovery.[2] "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 557 (1943) (Jackson, J. dissenting).

Defendants do not have standing to litigate the public disclosure provisions because they are not parties with a legal

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1. See for example, *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Insurance*, 944 F.2d 1149, 1154 (3rd Cir. 1991)

> The bill that eventuated in the 1986 amendments underwent substantial revisions during its legislative path. This provides ample opportunity to search the legislative history and find some support somewhere for almost any construction of the many ambiguous terms in the final version. We look *instead* to what we can glean from the principal intent, which was to have the *qui tam* suit provision operate *somewhere between* the almost unrestrained permissiveness represented by the Marcus decision, see id., and the restrictiveness of the post-1943 cases, which precluded suit even by original sources.

[emphasis provided].

2. The relevance of the fact that petitioners' counsel is also a surgeon, raised by respondents at Opp. Brief, p. 1, may be that there is benefit in taking a fresh look at the obvious.

stake in the issue and their participation leads to absurd results.

Indeed, the Court of Appeal for the Seventh Circuit, which appears to be the only court to consider section 3730 from a jurisdictional viewpoint, comes to the same conclusion as petitioners, albeit by relying on its own *contextual* reading of the statute:

> For what it is worth, we doubt that § 3730(e)(4)(A) uses the word "jurisdiction" in the sense of adjudicatory power, which is conferred by §§ 1331, 1345, and 3732(a) rather than "this section" (sec. 3730). In context, the word appears to mean that once information becomes public, only the Attorney General and a relator who is an "original source" of the information may represent the United States. This does not curtail the categories of disputes that may be resolved (a real "jurisdictional" limit) but *instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward.*

[Emphasis provided]. *U.S. ex rel. Fallon v. Accudyne Corp.* 97 F.3d 937, 941 (7th Cir. 1996).

4. Publication of the Purported Omissions in Petitioners' "Seriously Defective" Statement of the Case Does Not Assist Respondents.

Respondents catalog a number of purported errors by petitioners in their statement of the case. Opp. Brief p. 5-6. However, respondents do not indicate how the Court has been mislead by the omissions. On the other hand, the respondents have added fuel to the merits of petitioners' case in chief.

For example, respondents call attention to respondent Monterey County's RFP provision that providers are to

accept assignment or provide an alternative proposal to achieve the goal that *no hardship will occur to the elderly who are unable to pay their "co-pays"*. Opp. Brief at p. 6. The problem is, *ab initio*, Medicare patient co-payments are excessive because the total bill is inflated by overcharging, *inter alia*, Medicare beneficiaries to offset respondent counties' indigent care costs.

Respondent Pen Med agreed to do just that, but its public statement about the co-payment did not disclose the overcharge. Indeed, Pen Med characterized the service as "economical":

> "Sinnott [Pen Med president] said his service will be superior and more economical, especially for the elderly, **who generally pay only $110 out of pocket for Peninsula Paramedic service.**" [emphasis provided] Jones, R., *Monterey Peninsula Herald*, "Ambulance firms to do battle in court over county service" December 15, 1995 at page one.

Neither Sinnott nor respondent Monterey tell the public that their share of the ambulance fee[3], the co-payment, is inflated to make up for Pen Med's losses which accrue by respondent Monterey and Medi-Cal paying approximately the same amount as the elderly's *co-payment* in *complete payment* for ALS emergency ambulance service. See Medi-Cal and MIA reimbursement rates at Petition, Appendix C, Relevant Codes, p. 27a.

In the matter of Medicare fraud, the government publicly recognizes the value of the acts of medical providers such as petitioners. In the course of urging the public to take action to protect *themselves* against Medicare fraud and abuse, the

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3. The Medicare beneficiary must also pay premiums for part B ambulance services.

government says in the "Medicare & You 2000 Handbook" at p. 29:

> Most doctors and other kinds of health care providers who work with Medicare are honest and want to provide health care to you. There are a few who are not honest. We are working very hard with other government agencies to protect the program from the few who try to cheat Medicare.
>
> With help from you, **health care providers**, and law enforcement, Medicare is solving this problem. Medicare has sent some dishonest providers to jail, and some have left the Medicare program. These actions have saved money for taxpayers.

[emphasis provided].

The role of the patient may be limited however to checking the accuracy of the bill to services rendered:

> Every time you get health care in the Original Medicare Plan, you get an Explanation of Medicare Benefits or a Medicare Summary Notice from a company that handles bills for Medicare. It shows what services or supplies were charged and how much Medicare paid. Check it for mistakes. Make sure that Medicare wasn't charged for any services or supplies that you did not get. If you see a charge on your bill that may be wrong, call the health care provider and ask about it. If you think that a provider may be cheating or abusing Medicare, call the Medicare Carrier or Fiscal Intermediary.

Id.

The advice does not address systematic overcharging which does not appear on the face of a bill. That is where medical care providers with insider knowledge such as petitioners play a role.

5. Respondents Did Not Raise Article III Standing Below.

At Opp. Brief p. 19, respondents suggest this petition should not be granted if the Court holds that a private relator lacks Article III standing in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, No. 98-1828. Since respondents did not raise the questions below, petitioners have not had adequate time to fully review the applicable case law. From petitioners' initial review, the factual differences, private medical insurance fraud in this case versus state grants in *Vermont*, may lead to different considerations in such key questions as whether there is a particularized injury in fact in a Medicare fraud case brought by an individual subject to the Medicare tax, and a Medicare medical provider. Petitioners respectfully request the opportunity to brief the Article III issue if the petition would be granted on either or both of the two questions presented and if Article III standing is lacking in the *Vermont* case.

6. Conclusion.

For the foregoing reasons, and those stated in petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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